United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1337

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1337

UNITED STATES OF AMERICA,

Appellee,

against

NELSON CRUZ,

Defendant-Appellant.

Appeal from Order of the United States District Court for the Southern District of New York (D.C. Crim. No. 75 Cr. 1150)

REPLY BRIEF ON BEHALF OF APPELLANT NELSON CRUZ

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Introduction

In lieu of addressing the only issue raised on Nelson Cruz' appeal -- whether the District Court's refusal to grant relief from the government's "flouting of the judgment" (A. 48)[1] was an abuse of discretion -- the government has

[1] References are to pages in the Appendix.

submitted what appears to be an appellant's brief. Nineteen of the twenty-two pages of its text are devoted to discussing the validity of the sentence imposed by Judge Frankel, a matter not only irrelevant to the determination of Cruz' appeal, but not properly before this Court: The government interposed no objection at sentencing, nor has it made any motion, pursuant to Rule 35, F.R.Cr.P., to correct what it now terms an illegal sentence. Even if it had made such a motion, the government is permitted no appeal under 18 U.S.C. §3731. See United States v. Lane, 284 F.2d 935 (9th Cir. 1960).

The irrelevance of the validity question is perhaps best demonstrated by the government's continued refusal to commit itself to the proper effectuation of the judgment entered by the District Court. Conceding unequivocally that it intends to deny Cruz the very rights Judge Frankel's sentence was explicitly meant to confer -- an opportunity for early release, credit for good time and expungement of his conviction -- the government urges this Court to deal only with validity, and simultaneously disclaims any duty to obey even this Court's mandate:

> The far better solution [the government argues] is for this Court to declare Cruz' sentence valid or invalid and to allow Cruz to litigate the consequences of the sentence, if it is found valid, directly with the agencies charged with administering it. Gov't Brief, p. 22.

Thus, the United States Department of Justice asks this Court to render an advisory opinion, but to relegate

Nelson Cruz to as many as four separate actions against branches of the same department in order to secure his rights.[2]

Because the validity of the sentence imposed on Cruz is not at issue on this appeal, it is unnecessary to address that question here. Rather, this reply brief is submitted to demonstrate the government's failure to meet the arguments contained in our main brief.

THE DISTRICT COURT'S REFUSAL TO EXERCISE ITS DISCRETION WAS AN ABUSE OF DISCRETION

In our main brief, we established that this Court, as well as many others, has recognized the responsibility of district courts to reduce or modify sentences when they learn that release expectations entertained at the time of sentencing will not be realized. United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975); Kortness v. United States, 514 F.2d 167 (8th Cir. 1975); United States v. Manderville, 396 F.Supp. 1244 (D.Conn. 1975); DiRusso v. United States, 409 F.Supp. 1055

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2 Wholly apart from this unabashed effort to evade its responsibility to obey the law, the government's attempt to trifurcate the Department of Justice misses the lesson of United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972):

> The United States government is the United States government throughout all of the states and districts.

(D.Mass. 1976);[3] and United States v. Randle, 408 F.Supp. 5 (N.D.Ill. 1975).

In its brief, the government attempts to deal with only one of these cases, this Court's decision in Slutsky. There, although the defendants had been sentenced under 18 U.S.C. §4208(a)(2),[4] which made them eligible for parole at any time, the Parole Board's release guidelines[5] denied serious parole consideration until the one-third point in the defendants' sentences, when they would have received it anyway. The defendants moved for sentence reduction, as Cruz has here, pursuant to Rule 35, F.R.Cr.P.

Struggling to distinguish Slutsky, the government contends that this Court's decision was premised on a finding that the Parole Board's action, while within its discretion, was "illogical" (Gov't. Brief, p. 22). This misses the point entirely. Because the defendants in Slutsky were to receive no serious release consideration from the Parole Board before the one-third point, this Court found them to be "in no better position than a prisoner who has received a regular sentence" (514 F.2d at 1229; footnote omitted). The issue was not

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3 After filing our main brief, we learned that the District Court decision in DiRusso, which had been brought as a petition under 28 U.S.C. §2255, was reversed on jurisdictional grounds, 535 F.2d 673 (1st Cir. 1976). The First Circuit's opinion, however, supports Cruz' position that a timely Rule 35 motion is an appropriate vehicle for accomplishing the needed correction.

4 Now 18 U.S.C. §4205(b)(2).

5 28 C.F.R. §2.20.

whether this result was logical or illogical, but whether the defendants were entitled to "receive the parole treatment envisioned by the sentencing judge" (514 F.2d at 1229). Finding the Parole Board's treatment of the defendants inconsistent "with what we must assume were the reasonable expectations of the sentencing judge" (514 F.2d at 1229), this Court reversed the denial of the defendants' Rule 35 motion and remanded for resentencing.

A fortiori here, for despite his sentence to a definite term under the Youth Corrections Act, Cruz will not only not be in a better position than those sentenced as adults or as youths without a definite maximum term, he will be in a worse position than both. And although the government -- the Department of Justice -- plainly acknowledges that such treatment flatly contradicts Judge Frankel's sentencing expectations, it urges this Court to overlook that critical fact.

Conceding that the Bureau of Prisons (a branch of the Department of Justice) will deny Cruz "good time" credit and unconditional release after nineteen months under 18 U.S.C. §§4161, 4163 and 4164, and that the Parole Commission (another branch of the same department) will deny him an expungement certificate under 18 U.S.C. §5021, and ignoring altogether Cruz' eligibility for parole consideration now under 18 U.S.C.

§4205(a) and the Parole Commission's own regulations,[6] the government simply labels these crucial deprivations "ancillary issues" (Gov't. Brief, p. 22).[7]

Most significant, however, is the government's concession -- indeed, its argument -- that Cruz has received a harsher sentence than Judge Frankel intended. The government contends that in placing an outer limit on Cruz' incarceration, "Judge Frankel has deprived Cruz of one of the most valued benefits of the [Youth Corrections Act], that is, eventual vacatur of his conviction." Gov't Brief, p. 19n. Since Cruz was sentenced under the Youth Corrections Act, as Judge Frankel explicitly noted, principally because of the availability of expungement (see opinion of July 8, 1976, A. 49n.2), the frustration of Judge Frankel's sentencing expectations by the government's "effectuation" of the sentence could hardly be more blatant. As if that were not enough, the government reveals yet another glaring inconsistency

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6 A prisoner sentenced under the Youth Corrections Act . . . shall not be continued past one-third of his maximum sentence at an initial hearing without further hearing upon completion of one-third of his maximum sentence . . . .

28 C.F.R. §2.14(e), 41 Fed. Reg. No. 93, p. 19329 (May 12, 1976), effective May 14, 1976.

Cruz began serving his two-year sentence on February 23, 1976 (A. 24), and has now completed one-third. At his initial hearing, Cruz was continued (purely on the basis of the guidelines) past the one-third point (A. 38).

7 It is, of course, obvious that Judge Frankel did not consider early release, good-time and expungement "ancillary" (See opinion of July 8, 1976, A. 41-42, 49n.2).

when it declares that the two-year ceiling imposed by Judge Frankel, who could not have believed he was committing a futile act, "had no effect on [Cruz'] eligibility for release on parole" (Gov't. Brief, p. 20).

Ultimately, the government asserts that Cruz' claims are premature and states that effective remedies are available to him. Even as an abstract proposition, this argument has no merit. In the real world, however, relegating Cruz to as many as four separate actions to vindicate his rights would not only result in what should be wholly unnecessary expenditures of judicial time and energy, but will have the effect of simply denying these rights.

Apparently, the government would have Cruz bring first an action -- presumably in the nature of mandamus -- to secure an immediate parole hearing. Yet, how many months will have passed -- irretrievably -- before relief is obtained and a parole hearing held? And if the hearing to which Cruz is now entitled results, as Judge Frankel expected, in early release, how will the government return the time Cruz will have lost?[8]

Next, the government contends that Cruz should commence a habeas corpus proceeding "at such time as Cruz would be

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8 Denial of early release based solely on the Parole Commission's guidelines (as was the initial continuation to twenty-one months) may itself precipitate another action. See, e.g., United States ex rel. Mayet v. Sigler, 403 F.Supp. 1243 (M.D.Pa. 1975), holding that the guidelines may not be used to deny release of a Youth Offender.

entitled to release were the good time credited." Gov't. Brief, p. 21. Once again, a determination in such a proceeding could not be obtained until after the required release date, at the expense of the very liberty Cruz sought to secure. Moreover, the delay which can be anticipated now, given the government's present litigious posture, might well result in Cruz' incarceration until the expiration of the two-year term, surely a circumstance the government would seize upon to deny expungement.[9]

Finally, the government suggests a mandamus action against the Parole Commission "to vindicate his rights" to an expungement certificate. Yet, the government itself notes (at page 21 of its brief) that it sees no means other than resentencing to "ease" the "present uncertainty" as to Cruz' eligibility for expungement, an opportunity which, as described above, was uppermost in Judge Frankel's mind at resentencing. If the government's present administration of the sentence Cruz is serving will render him ineligible for expungement, he should be resentenced now in order to restore a right Judge Frankel specifically intended to confer.

That these rights the government would deny Cruz now and have him litigate later should be recognized on this

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9 Under 18 U.S.C. §§4161, 4163 and 4164, Cruz should be unconditionally released after nineteen months, thereby earning a certificate setting his conviction aside pursuant to 18 U.S.C. §5021, regardless of the period of post-release supervision.

appeal is the precise teaching of Bartone v. United States, 375 U.S. 52, 54 (1963):

> It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than to remit the parties to a new collateral proceeding.

Thus, the issue to be decided on this appeal is whether resentencing pursuant to Rule 35 is a possible mechanism for rectifying this gross disparity between the expectations of a sentencing judge and the government's administration of the sentence imposed. In Slutsky, this Court held that it was not only possible, but required:

> [W]hen, as here, there has been a timely motion for reduction of sentence, and the mistake is easily rectified by providing for resentencing, the interests of justice mandate such a procedure. 514 F.2d at 1229.

The government's notion that treatment of Cruz' claim on a Rule 35 motion "will only breed confusion" (Gov't. Brief, p. 22) misplaces the responsibility for creating the need for an ad hoc remedy here. As Judge Frankel ruled, "the fractioned and inconsistent handling of this case by the Department of Justice is obviously to be regretted and corrected" (A. 43). Yet, the court below refused to exercise its discretion to provide that correction. As it did in Slutsky, this Court should decline to permit the government, in its several guises, to perpetuate what Judge Frankel characterized as its "flouting of the judgment" (A. 48).

CONCLUSION

For all the reasons appearing above and in our main brief, this Court should vacate the District Court's order denying Cruz' timely Rule 35 motion and remand to the District Court for resentencing.

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Respectfully submitted,

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